IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 775 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BARKAT GULAMHUSEN - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS SADHANA SAGAR for Appellant(s) : 1,
MR RC KODEKAR APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE MD SHAH

Date : 06/03/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal under Section 374 of the Code of Criminal Procedure has been preferred by the present appellant-accused being aggrieved and dissatisfied by the judgment and order of conviction dated 15th July, 1998 passed by the learned Additional Sessions Judge, Junagadh in Sessions Case No.65 of 1995 whereby the appellant-accused was convicted and sentenced to undergo rigorous imprisonment for life and fine of Rs.1000/-, in default, to undergo further 6 months S.I. for the charge under Section 302 of the Indian Penal Code. However, he was acquitted for the charge under Section 498(A) of the IPC and under Section 4 of the Prevention of Dowry Act. The learned Additional Sessions Judge, Junagadh acquitted the original accused nos.2 and 3 for the charge under Sections 498(A), 304(B), 302 read with Section 114 of the IPC and under Section 4 of the Prevention of Dowry Act.

2. It may be noted that against the acquittal of the original accused no.2 and 3, State has not preferred appeal against and, hence, it has become final between the parties.

3. The case of the prosecution in short is that the complainant viz., Naralibhai Valjibhai lodged complaint before Keshod Police Station alleging inter alia that his younger daughter viz., Shahenaz got married to original-accused no.1 viz., Barakatali Gulamhusen i.e. present appellant-accused four years prior to incident. Out of said wedlock, they have a boy named Amin aged about two and half years. After 4-5 months of the marriage, the deceased and the appellant-accused no.1 started residing together in a separate house. The appellant-accused was running flour mill. However, the administration of the house was run jointly by the accused viz., Gulamhusen. Whenever the deceased used to visit the house of the complainant, she complained of ill-treatment and harassment on account of insufficient dowry being meted out by the accused persons. If she does not bring money, the accused persons were using filthy language and also taunting and beating her. After the pregnancy of the deceased, they kept on demanding money. Since the complainant could not fulfill their demand due to poor economic condition, the accused persons started harassing and beating her. Before one month of the incident, the deceased came to the house of the complainant and told that the accused

persons were demanding Rs.15,000/- for purchasing Taxi. At that time, the complainant told that he would make some arrangement within short period. On 30.01.1995 at about 8 o'clock in the evening, persons from the matrimonial home of the deceased came and informed the complainant side that the deceased was not feeling well and, hence, she is taken to Keshod Government Hospital. On knowing about such incident, the complainant and other family members went to Keshod Government Hospital, where they found the dead body of the deceased. Meanwhile, Dr.Vachhani of Keshod Government Hospital informed Keshod Police Station and, hence, A.D.No.40/1995 came to be registered. Upon asking the reasons behind the incident, the in-laws told that she died due to heart attack. Since the complainant was not satisfied with the reply, he insisted for performing postmortem for knowing the cause of death. The postmortem was thereafter performed at Jamnagar and, thereafter, dead body was handed over to the complainant and they cremated the dead body at about 12:30 at the night. Accordingly, complaint came to be registered before Keshod Police Station for the offence under Sections 302, 304-A and 498(A) of the Indian Penal Code and under Section 3 of Prevention of Dowry Act

against the accused.

4. On the basis of the complaint, the investigation of commenced. Offence place panchnama was drawn, statements of concerned witnesses and statement of Dr.Jitendrabhai were recorded, the accused persons came to be arrested and sent to judicial custody. After completion of the investigation, charge-sheet came to be filed before the Learned Judicial Magistrate (First Class), Keshod. Since the case registered against the appellant-accused was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions under Section 209 of the Criminal Procedure Code by the Learned Judicial Magistrate (First Class), Keshod. The charge was framed vide Exh.1, wherein the accused pleaded not guilty and claimed to be tried.

5. To prove the case against the accused, the prosecution examined the following witnesses :-

(1) Prosecution Witness No.1 viz., Satish Dinkarbhai Kalel, Exh.10.

(2) Prosecution Witness No.2 viz., Dr.Vinodray Thakarshi Vachhani, Exh.17.

(3) Prosecution Witness No.3 viz., Maganlal Bhagvanji Bhatt, Exh.28.

(4) Prosecution Witness No.4 viz., Sagabhai Polabhai, Exh.30.

(5) Prosecution Witness No.5 viz., Nurali Valjibhai, Exh.32.

(6) Prosecution Witness No.6 viz., Jubedaben Nuralibhai, Exh.34.

(7) Prosecution Witness No.7 viz., Jitendra Karamshi, Exh.36.

(8) Prosecution Witness No.8 viz., Amina Akbar, Exh.37.

(9) Prosecution Witness No.9 viz., Shakina Nurali, Exh.38.

(10) Prosecution Witness No.10 viz., Jiva Jina, Exh.55.

(11) Prosecution Witness No.11 viz., Arjan Ram, Exh.57.

(12) Prosecution Witness No.12 viz., Bhimshi Ram, Exh.58.

(13) Prosecution Witness No.13 viz., Devidas Uda, Exh.61.

(14) Prosecution Witness No.14 viz., Bavaku Surag, Exh.67.

6. The prosecution also placed reliance upon various

documentary evidence viz., offence place panchnama at Exh.52, inquest panchnama at Exh.39, arrest panchnama of accused viz., Barakatali at Ex.53, panchnama of seizure clothes Exh.40, arrest panchnama of accused viz., Gulamhusen and Jiluben at Exh.41, FSL report at Exh.42, receipt showing muddamal received by FSL at Exh.43, FSL report at Exh.46, serological report at Exh.47, forwarding letter at Exh.48, report of toxicological of FSL at Exh.49, forwarding letter at Exh.50, and map of place of offence at Exh.25.

7. The learned Additional Sessions Judge, Junagadh, after considering and appreciating the evidence on record, was of the view that the prosecution has successfully established the guilt against the appellant-accused for having committed offence punishable under Section 302 of the Indian Peal Code and, therefore, he accordingly, passed the order of conviction and sentence against the appellant-accused as stated hereinabove.

8. Being aggrieved by the conviction and sentence awarded by the trial Court, the present appellant original accused no.1 has preferred this appeal.

9. We have heard learned counsel, Ms.Sadhana Sagar for the appellant-accused and learned Additional Public

Prosecutor Mr. R.C. Kodekar for the State. We have been taken through the record and proceedings by both the sides.

10. Ms. Sagar, the learned Advocate, who appears on behalf of the appellant-accused has contended that the learned trial Judge has committed a grave error in recording the judgment of conviction and sentence. It is contended that there is a delay in filing the FIR. According to her, the panchas have not supported the case of the prosecution and have been declared as hostile. Ms. Sagar has, therefore, urged that the present appeal deserves to be allowed and the judgment of conviction and sentence as pronounced by the learned trial Judge requires to be set aside.

11. Mr. R.C. Kodekar, learned Additional Public Prosecutor, who appears on behalf of the respondent-State took us through the reasoning of the learned Additional Sessions Judge and submitted that no interference is called for in the impugned judgment and order as the prosecution has established the case against the appellant-accused beyond reasonable doubt. It is submitted by the learned APP that there are sufficient evidence available on record to connect the appellant-

accused with the crime in question. Mr. Kodekar has further contended that the evidence on record would go to show that the death of the deceased Shahenaz was a homicidal death because Dr. Satish Kalel, who has been examined by the prosecution at Exh.10 had noticed some injuries on the person of the deceased. Mr. Kodekar has, therefore, urged that the learned trial Judge was perfectly justified in coming to the conclusion that the accused had committed the crime. Raising the abovesaid contentions, Mr. Kodekar has urged that the present appeal deserves to be dismissed.

12. We have gone through the oral as well as documentary evidence and the reasoned judgment delivered by the Court below shown to us by the learned counsel for the respective parties. We have minutely evaluated the same in toto. It is amply clear from reading of the record and proceedings that here is a case where the prosecution has adduced only circumstantial evidence and no direct evidence was available.

13. As far as homicidal death is concerned, the Court below has discussed the same on page nos.5 to 8 in the judgment as Point No.1 and while doing so, the Court below has taken into consideration various

evidence viz., P.W.No.2, Dr.Vinodray Thakarshi Vachhani at Exh.17, P.M.Note issued by Dr.Vinodyra at Exh.19, P.W.No.1 viz., Shatish Dinkar at Exh.10, P.M.Note given by P.W.No.1 at Exh.15. The Court below also reproduced the external as well as internal injuries in the judgment, which were also dealt with in detail and came to the conclusion that it is a case of homicidal death. After going through the evidence shown by the learned counsel for the appellant, we are of the opinion that the learned counsel for the appellant is not in a position to convince for a finding alternative to the finding given by the Court below and we are sure about the view taken by the Court below of homicidal death.

14. The P.W.No.1 viz., Dr.Satish Kalel, who was examined at Exh.15 has deposed that on 31.01.1995, he was discharging his duty at M.P. Shah Medical College. At that time, dead body was brought before him along with police yadi. This witness in his deposition narrated the injuries received on the body of the deceased. This witness opined that the cause of death is asphyxia due to smothering and throttling and, hence, injuries received on the body of the deceased can be possible in this type

of incident. This witness has been cross-examined, but nothing contrary came out.

15. The P.W.No.2 viz., Vinodray Vachhani, who was examined at Exh.19 has deposed that on 30.01.1995, he was discharging his duty as Medical Officer, Community Health Centre, Keshod. At that time, one dead body of Shahenaz was brought before him along with police yadi for the purpose of postmortem. Since, he could not find the cause of death of the deceased, he sent the dead body to Jamnagar Hospital.

16. From the evidence of P.W.No.5 viz., Nurali Valjibhai, who was examined at Exh.32, it is established that on receiving the information about the incident, they went to Keshod Community Health Centre, where they found the dead body of the deceased.

17. As far as other evidences are concerned, it is required to be noted that the present case is based on circumstantial evidence. It is also established from the evidence on record that the marriage of the deceased took place with the appellant-accused no.1 four years prior to the offence. Out of their wedlock, the deceased delivered one male child viz., Amin, who was aged about two years at the

time of incident.

18. It is also not in dispute that the incident took place on 30.01.1995 during night hours, more particularly, before 6:30 a.m. in the matrimonial house of the deceased. It is also established from the evidence on record and the reasoned judgment delivered by the Court below that at the time of incident and/or prior to the incident also, the deceased, appellant-accused no.1 and their minor son viz., Amin were staying separately and the original accused nos.2 and 3 i.e. father-in-law and mother-in-law were staying separately in the same village, but at a distance. Simultaneously, it is also established from the evidence of P.W.No.7 viz., Jitendra Karamshibhai, who was examined at Exh.36 that the father-in-law of the deceased came to call him at his residence and informed him that the wife of the original accused no.1 is sick and, therefore, he accompanied the father-in-law of the deceased and went to the house of the appellant-accused, where he found that the body of the deceased was lying there. On preliminary examination, he found that the victim is no more and opined that it is a homicidal death. This witness advised to take the victim to Keshod

Community Health Centre for knowing cause of death. It is also established from record that since Police came to know about the incident from Keshod Community Health Centre, A.D.No.40/1995 came to be registered.

19. It is required to be noted that the incident took place in the house of the appellant-accused during night hours and prosecution was able to prove that at the time of incident, the appellant-accused, deceased and their son viz., Amin were only present in the house. We have gone through the statements recorded under Section 313 of the Cr.P.C. of the accused, which shows that when the incident takes place in the matrimonial house in absence of other family members then, it is the duty of the concerned person to explain as to what happened to her. If he fails to explain the same satisfactorily then, presumption can be drawn against him. In this connection, we rely upon the case reported in 1992(2) Crimes SC 161 in the case of Ganeshlal V/s. State of Maharashtra, wherein the Apex Court has held that whenever a girl dies in the matrimonial house, it is the duty of the husband, in-laws or the person, who resides in the same house to explain the cause of death of the deceased. It is

also held by the Apex Court that at-least they should explain in the statements recorded under Section 313 of the Cr.P.C. as to the circumstances leading to the death and if they fail to do so then, presumption can be drawn against them. Here in this case also, as we have stated above, the appellant-accused or the father-in-law and mother-in-law of the deceased have not given proper explanation in their statements recorded under Section 313 of the Cr.P.C. In these circumstances, it is the strongest circumstance, which goes against the appellant. Over and above, there are evidence on record which shows that at the time of arrest of the appellant-accused, clothes of the appellant-accused worn at the time of incident were seized under the panchnama and blood found on one of the fingers of the appellant-accused was sent to FSL. On arrival of the FSL report, it is established that the blood found on the finger and the blood of the deceased are of the same group AB group. From the evidence on record, the presence of the appellant-accused at the time of incident is established. Not only that, it is not the case of the defence that the appellant took the deceased to the hospital and while handling her, he received this blood stain. On the contrary, he tried to keep

himself away from the incident. In these circumstances, it is one of the strongest circumstances, upon which, Court below has also placed reliance. Over and above, there are other evidence on record to connect the appellant-accused with the crime in question. It is also required to be noted that when the appellant-accused was in judicial custody, he has shown willingness to show the clothes worn by him at the time of incident and the weapon used by him for killing his wife and, hence, preliminary panchnama to that effect was drawn and, thereafter, secured the presence of panchas and seized the muddamal clothes as well as weapon from the house of the appellant-accused under the panchnama. Same were sent to FSL, wherein also, 'AB' group blood was found. It is true that both the panchas of above said panchnama and discovery panchnama have not supported the case of the prosecution. However, P.W.No.14 i.e. Dy.S.P. deposed the same in toto and said panchnama was proved by way of evidence of the I.O. i.e. Dy.S.P. Mr.Jebalia. Law is settled on this point that merely because panchas have been won over by the accused, the case of the prosecution cannot be discarded. Here in this case, the I.O. is of the rank of Dy.S.P. and is an independent witness.

Panchas are of the same village. If they do not support the say of the prosecution upto certain level, only on that ground, panchnama should not be thrown away because in their cross-examination, they admitted the fact that they were panchas of panchnama and they went to the place at the instance of the appellant-accused, where they stood inside the house and simply signed in the panchnama. According to us, the discovery panchnama was also proved by the prosecution beyond reasonable doubt and there is no reason to disbelieve the evidence of police officer, who is an independent witness. Over and above, the prosecution also got support from the FSL report at Exh.46 & 47.

20. As far as the contention raised by the learned counsel for the appellant-accused regarding delay in filing of the FIR is concerned, we have gone through the evidence on record, which shows that incident took place on 30.01.1995 before 6:30 p.m. It is required to be noted that at about 10:00 a.m., the dead body was received by the P.W.No.2, Medical Officer, Keshod Community Health Centre and upon examination of the dead body, he opined that expert opinion is required and, therefore, the dead

body was sent to Jamnagar Hospital. On completion of the postmortem, the dead body was handed over to the family members of the complainant on 31.01.1995 in the evening, thereafter, body was cremated. It is also required to be noted that prior to that, A.D.No.40/1995 came to be registered with Police Station. Being the father of the deceased and having lost their younger daughter, as they were busy in cremation ceremony, they filed the complaint on 01.02.1995 at the earliest point of time and, hence, it cannot be said to be a delay in filing the FIR. If at all, this is considered to be a delay, it has been properly and sufficiently explained by the prosecution.

21. As discussed above, marriage life is of four years. The incident took place in the matrimonial house and at the time of incident, except the appellant-accused, the deceased and their minor son aged about 2 years, there are no other family members. Even the appellant-accused failed to give any satisfactorily explanation regarding the incident but on the contrary, he tried to destroy the evidence, which has been ultimately produced by him by way of discovery panchnama. It is also established that it is a case of homicidal death

and it is not the case of other side either by way of cross-examination or in their statements recorded under Section 313 of the Cr.P.C. that at the time of incident, nobody was present and the incident took place in other manner. Not only that, he himself kept away from the incident and has not informed the police in time. Even doctor was called after a period of two and half hours. Prosecution has also able to prove that there was blood stain on the finger of the appellant-accused, which is of AB group and same is supported by the FSL report. The appellant-accused has killed his wife in a cool blooded manner and the way in which the incident took place, we are not in a position to interfere with the reasons given by the Court below. Thus, the prosecution has been able to prove the case against the appellant beyond all reasonable doubts.

22. As far as the role of the present appellant is concerned, from the deposition of the witnesses examined by the prosecution, it is clear that the physical and mental torture were meted out by the accused persons. However, the original accused nos.2 and 3 i.e. the father-in-law and mother-in-law of the deceased have been acquitted of the charges levelled against them and no appeal has

been filed against the said acquittal. Hence, it has become final between the parties.

23. Besides above chain of circumstances, other factors needed to be taken note of are that the accused has not been able to explain his absence from 6th August, 1993 till 20th August, 1993, the day on which he was apprehended. He could not explain the injury sustained by him. He also did not retract his extra-judicial confession.

24. In our opinion, therefore, learned Additional Sessions Judge has rightly appreciated the evidence on record by following the established canons of appreciation of evidence. We do not find any merit in this appeal calling for any interference with the finding of the trial Court. We have gone through the judgment of the learned Additional Sessions Judge and we find that reasonings adopted and conclusions arrived at by the learned Additional Sessions Judge are just, legal and proper and we are in agreement with the same.

25. In view of the above, there is no substance in the contentions raised by the learned counsel for the appellant-accused and, hence, this appeal is required to be dismissed.

26. The appeal is dismissed.

(R.P.DHOLAKIA, J.) (M.D. SHAH, J.)

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